United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 77-7109

In the

United States Court of Appeals

For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER, *Plaintiffs-Appellants.* *vs.* SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of New York. Honorable **Constance Baker Motley**, Judge Presiding.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

REPLY BRIEF OF PLAINTIFFS-APPELLANTS.

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DAVID BECKER and MARGARET B. LEDDER, Plaintiffs-Appellants, vs. SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of New York. Honorable Constance Baker Motley Judge Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

I. DEFENDANTS HAVE ASSUMED THE CRITICAL ISSUE TO BE ADJUDICATED ON THIS APPEAL: WHETHER PLAINTIFFS' CLAIM WAS INCLUDED IN THE COLE ACTION

Defendants' brief begs the very question which this court is called upon to decide on this appeal. Like a ship in the night, their brief silently passes the questions presented by the plaintiffs' opening brief and instead proceeds on the assumption that these questions have already been resolved in their favor.

Thus, defendants argue that the trial court did not abuse its discretion in denying class action status because plaintiffs' claim was included in the Cole litigation; and that, because plaintiffs' claim was adjudicated in Cole, plaintiffs are now barred by principles of res judicata and equitable and collateral estoppel. These arguments are completely irrelevant to the basic question on this appeal.

The issue in this Court is not whether, given the identity of claims in the two actions, the trial court abused its discretion in denying class action status; nor is it whether, given such identity of claims, principles of res judicata or collateral estoppel apply. Rather, the critical issue is whether the claim in the present case and the claim in Cole indeed were the same.

On this critical issue, defendants' brief restricts itself to references to scattered allegations made in the Cole complaint and to assorted statements in the Cole pre-trial order. Defendants insist that such allegations and statements themselves constitute claims. (Def. Br. 15-19). Defendants make no effort whatsoever at analysis of the allegations against the settled legal concept of a "claim for relief" under federal law. Nor do defendants anywhere attempt a rebuttal of the detailed analysis of the nature of

the Cole claim presented in the brief of plaintiffs herein. (Pl.Br. 14-24).

More significant, defendants make no effort to reconcile the description of the claim in Cole, as set forth in the opinions of Judges Weinfeld and Owen, with their own view of that claim. As shown in plaintiffs' brief (pp. 9-10, 18-19) Judges Weinfeld and Owen, the two District Court judges who presided in Cole, analyzed the claim in that case as one asserting that the proxy statement issued in connection with the merger of Schenley into Glen-Alden in June, 1971 was false and misleading. (A. 371, 486). Neither of them discerned in Cole any claim for relief arising out of the proxy statement issued in connection with the merger of BHM into Schenley in November, 1969.

Equally important, and totally unrebutted by defendants, is the fact that the claim in the present case, that the 1969 proxy statement was misleading because it concealed the true value of Buckingham, could not have been raised in Cole because, at the time of the Schenley-Glen Alden merger, the true value of Buckingham was no longer concealed. This was expressly recognized by Judge Owen, who found, albeit in a different context:

"There is no question that Schenley was a 'cash rich company' at the time of the proxy statement. The facts about its cash position and the sources of the growth of Schenley's cash were adequately disclosed and are not in dispute. What is in dispute is (1) whether or not the proxy statement wrongfully failed to compare Schenley's cash position on May 31, 1971 with its cash position exactly three years earlier; (2) whether the proxy statement wrongfully failed to disclose the extent of the proposed use of Schenley's cash upon consummation of the merger, and (3) whether the proxy statement wrongfully failed to state that Schenley had approximately $140,000,000 in 'excess cash.'

* * *

While there was a dispute arising on the trial as to whether Schenley's cash position at the time of the proxy statement was $162,000,000, as contended by Schenley, or $191,000,000, as contended by plaintiffs, the sources in the improvement in the company's cash position was (sic) fully revealed. These sources were the sale of Buckingham, an increase in net worth resulting from operating earnings after the payment of dividends, certain cash held by Buckingham prior to the time it became a wholly owned subsidiary of Schenley's and the reduction of inventory." (A. 486-7) (Emphasis supplied)

What clearly emerges from a comparison of the complaints in the two cases, and from a reading of the opinions of Judges Weinfeld and Owen, is that the present case and Cole:

(a) involve two distinct and unrelated corporate mergers,

(b) separated in time by 18 months,

(c) between different corporations,

(d) which involved separate and unrelated proxy statements, one concealing and one disclosing the value of Buckingham Corporation, and

(e) which involved entirely different classes of stockholders.

Given these undisputed facts, defendants have a heavy burden of persuasion to convince this Court that the claims in the two cases were the same. Defendants' brief falls far short of carrying this burden.*/

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*/ While defendants did succeed in convincing the trial court, the fundamental inconsistencies in that court's memorandum order of September 19, 1975 denying class action certification strongly suggest that defendants prevailed not on the basis of reasoned analysis but rather by creating confusion. While holding that plaintiffs' claims were encompassed in Cole and that plaintiffs were members of the Cole class (and consequently bound by any judgment entered therein), the trial court nevertheless ordered the parties to trial in three weeks. (A. 249, 251). It was manifestly inconsistent for the trial court to hold that plaintiffs were members of the Cole class and that their claim was being litigated in that action, while simultaneously ordering the parties to trial on that same claim in the present action. By ordering plaintiffs to litigate their claim in the separate trial in the present case, the trial court implicitly recognized that that claim was not being litigated in Cole, a result totally inconsistent with its holding that plaintiffs could not maintain this action as a class action because plaintiffs' claim was included in Cole.

II. DEFENDANTS MISCONCEIVE THE NATURE OF A "CLAIM FOR RELIEF" AS DEFINED BY SETTLED LAW

Defendants argue (Point I) that the trial court did not abuse its discretion in denying class action certification because plaintiffs' claim was included in the Cole action. While it is true that a trial court is afforded broad discretion under Rule 23, it is also true that where, in the exercise of that discretion, the trial court has committed a fundamental error of law in denying class action certification, that error is not insulated from review and reversal merely by labeling the trial court's decision as "discretionary." See, e.g., the following cases in which denials of class action certification were reversed: Green v. Wolf Corp., 406 F.2d 291 (2nd Cir. 1968); Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); Mader v. Armel, 402 F.2d 158 (6th Cir. 1968); Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir.1969). It therefore adds nothing to resolution of the issues on this appeal to speak, as do defendants here, in terms of the trial court's discretion; the determinative issue of identity of claims for relief vel non cannot be so easily avoided.

As previously noted, the burden of defendants' argument that the claim in the present case was included in Cole (Def. Br. 15-19), is that merely because the Cole

complaint and pre-trial order alleged and referred to the misleading nature of the 1969 proxy statement, a "claim" with respect thereto was asserted. But, in so arguing, defendants make no effort to analyze, let alone define, the nature of the claim asserted in Cole, nor do they offer any authority for the proposition that that a mere allegation of fact, in and of itself, constitutes a claim. This, of course, is not the law.

In their opening brief, plaintiffs presented a detailed analysis of the claim for relief made in Cole, the theories of recovery, and the purpose and function of the allegations in the Cole complaint pertaining to the 1969 proxy statement and merger. Defendants' brief fails to respond to these arguments. In addition, plaintiffs stressed that no relief was sought in Cole on behalf of the BHM minority stockholders for damages suffered by them in the 1969 merger. Again, defendants chose not to respond, a serious omission, since the Federal Rules of Civil Procedure governing pleadings are based on the litigation of "claims for relief." (Rules 8(a); 12(b)).

Defendants' misconception of the nature of a claim for relief, upon which their entire brief is based, is illustrated in the cases which have analyzed the nature of a claim for purposes of Rule 8(a), Rule 10(b) and Rule 54(b), F.R.C.P.,

and for the purpose of applying the doctrines of res judicata and collateral estoppel.

In Original Ballet Russe, Ltd. v. Ballet Theater, Inc., 133 F.2d 187, 189 (2d Cir. 1943) Judge Swan defined a claim as "the aggregate of operative facts which give rise to a right enforceable in the courts." In that case it was held that a series of wrongful acts, all aimed at a single wrongful result, constituted but one claim. (Id.) Thus, even though, as in the Cole complaint, separate transactions, occurrences or events (including the 1969 BHM proxy) which give rise to the wrongful result (deception of Schenley's minority stockholders in the 1971 Schenley-Glen Alden proxy) are alleged, such allegations do not constitute the assertion of separate claims.

It is to be noted that the complaint in Cole was brought in five counts. None of these counts asserted a claim for relief arising out of any wrongful conduct of the defendants in connection with the 1969 BHM Schenley merger. If the plaintiffs in Cole had asserted a separate claim for relief in connection with that transaction, it is to be expected that such claim would have been stated in a separate count. Rule 10(b), F.R.C.P. It was not. As Judge Swan stated in Original Ballet Russe, Ltd.:

> "The complaints at bar do not treat the defendants' acts as separate transactions or occurrences nor ask for separate judgment against the defendant charged with doing a particular act. All the acts are alleged to be connected by the common purpose and directed to the common end of driving the plaintiff from the theatrical world. We do not think that a separation into counts is necessary to facilitate 'the clear presentation of the matters set forth.'"

Similarly, in Cole, plaintiffs alleged a series of wrongful acts all directed to the common end of defrauding the Schenley minority stockholders in connection with the 1971 Schenley-Glen Alden merger. Although these acts included alleged past deceptions in connection with the 1969 proxy statement, the Cole plaintiffs did not assert and clearly, from their complaint, did not intend to assert a separate claim arising out of the 1969 BHM Schenley merger. This conclusion is inescapable not only under Original Ballet Russe, Ltd., supra, but also because (a) the Cole plaintiffs sought no relief for any injury suffered in the earlier transaction, and (b) the Cole class, as defined by Judge Weinfeld, had no standing to assert such a claim since that class consisted not of BHM minority stockholders at the time of the 1969 merger, but Schenley minority stockholders at the time of the 1971 merger.

That the Cole action did not include the claim asserted by plaintiffs in the present case is further

illustrated by the language of Rule 8(a)(2) which requires that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Nothing in the Cole complaint shows that the plaintiffs therein were entitled to any relief in connection with the 1969 BHM-Schenley merger, and indeed, none was sought.

If the present case and Cole are analyzed in terms of the law developed under Rule 54(b), F.R.C.P., the result is still the same: the two cases involved separate claims. Plaintiffs' opening brief (pp. 25-29) extensively argued this point. Further supporting the conclusion is the analysis of former Chief Judge Clark of this Court in Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 86-87 (2d Cir. 1939). While eschewing the "rigid rules" of the past, Judge Clark emphasized the importance of analyzing the content and nature of a "claim" with due regard for the "purpose for which the concept is being immediately used." For him the emphasis should be "upon a lay view of the past events which have given rise to the litigation."

Since, for the purpose of determining appealability under Rule 54(b), where multiple claims are present in a single litigation, courts must make the same careful analysis of the substance and content of a "claim"

as is required in the present case, it is helpful to take a lay view of the transactions and occurrences which have given rise to the two cases. It is worth repeating that the transactions in the present case and in the Cole case were entirely separate mergers, 18 months apart, involving different corporations, proxy statements and minority stockholders. On such a record it strains reason to say, in the language of Judge Clark, that the "lay view" would perceive these two lawsuits as involving the same claim.*/

In an effort to rebut the plaintiffs' argument that the relief sought in the two cases would not be duplicative, defendants offer the ipse dixit at pp. 19-20 of their brief, that "If plaintiffs in Cole ... had received a recovery on their claim that the BHM minority stock had been appropriated in 1969 for less than its true value ..., this would obviously have been directly duplicative of any damages that might have been awarded in the present case." This ipse dixit depends wholly on the assumption contained therein that the Cole plaintiffs were asserting a claim for relief arising from the BHM proxy statement, an assumption unsupported by the Cole pleading itself and inconsistent with the legal precedents argued above.

Defendants also select phrases from one of plaintiffs' trial court briefs in an effort to show that,

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*/ On this point, the Rule 23 notice sent to the class members in Cole, is virtually controlling. That notice unequivocally stated that the Cole action sought recovery of money damages "arising out of the merger of Schenley Industries, Inc. and Glen Alden Corporation ... effectuated on June 17, 1971." See Supplemental Appendix, p. 2, attached to this brief.

on the question of duplicate recovery, plaintiffs took a contrary position below. The quoted phrases are taken out of context and distort the plain meaning of the passages in which they appear. All that plaintiffs were attempting to show below was the gross inequity which would result if they were forced into the Cole litigation. At no time have plaintiffs ever conceded that recovery on their claim as BHM stockholders for injury suffered in the 1969 merger, and recovery on any claim asserted in Cole on their behalf as Schenley stockholders for injury suffered in the 1971 merger, would be mutually exclusive or duplicative. (See Pls. Br. pp. 25-29).

Defendants' repetitive references to plaintiffs' failure to intervene in Cole may be viewed as a classic red herring. The argument assumes as its predicate that a claim for relief arising out of the 1969 merger was present in Cole.*/ Clearly, it was not. Under such circumstances an effort to intervene in Cole, (an action limited to the 19 merger and seeking relief only with respect thereto), for the purpose of introducing a new claim on behalf of a new class, seeking wholly different relief would

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*/ Obviously, when the trial court suggested intervention in Cole, it was in the context of its erroneous holding that the claim herein and that in Cole were the same.

have been improper and futile.*/ If, in the present action, plaintiffs were seeking to relitigate the claim in Cole, which attacked the 1971 merger, then plaintiffs' failure to intervene in Cole might be relevant. However, plaintiffs' claim in the present case has nothing to do with the 1971 merger; and conversely, the claims in Cole had nothing to do with the 1969 merger. Thus, plaintiffs' failure to intervene in Cole is totally irrelevant to the question of whether plaintiffs have a right to maintain the present suit as a class action on behalf of all minority stockholders of BHM who were defrauded in the 1969 merger.

Defendants play a further variation on their "intervention" theme by arguing that plaintiffs are barred from proceeding with the present action under the principles of equitable estoppel. (Def. Br. pp. 27-29). This argument suffers from the same defect which pervades defendants'

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*/ It is to be noted that the question of consolidation of the present case with Cole was raised and extensively discussed at oral argument on the original submission of plaintiffs' class action motion on November 3, 1972. Judge Tenney rejected the suggestion that two actions might be consolidated (see plaintiffs' Reply Memorandum June 21, 1974 pp. 2, 41). Indeed, he even refused to be bound by a ruling in Cole respecting discovery, holding that "that decision is not binding by way of res judicata or collateral estoppel." Memorandum Opinion, October 15, 1973.

entire brief: the unreasoned assertion that the claim in the present case was included in Cole. It would serve no purpose to prolong this brief by reiterating here that defendants' assertion cannot be supported either by the record in Cole or the governing precedents construing the meaning of a "claim for relief."

III. THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL HAVE NO APPLICATION TO THE PRESENT CASE

A. Res Judicata

As was true with respect to their earlier arguments, defendants' contention (Point III) that plaintiffs' claim is now barred by res judicata because of the judgment in Cole, assumes without argument that the claim in the present case was included in the Cole action. Defendants cite numerous authorities, none of which is applicable unless the conclusion, which defendants assume, is accepted. Defendants' authorities apply only when the two lawsuits in question pertain to the same transaction and arise out of the same operative facts. E.g., Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968); Ruskay v. Jensen, 342 F.Supp. 264 (S.D.N.Y. 1972). Two unrelated mergers, occurring eighteen months apart, are not "the same transaction"; facts allegedly concealed in one proxy statement, but indisputedly revealed in another issued eighteen months

later, are not "the same operative facts."

Defendants have again avoided any analysis of the body of law which, for purposes of applying the doctrine of res judicata, determines whether the claims asserted in the two actions are the same.

In Herendeen v. Champion International Corp., 525 F.2d 130, 133 (2d Cir. 1975) this Court said:

> "The test for determining whether the causes of action are the same for purposes of res judicata has been variously expressed. Most frequently cited as relevant criteria by both this court and the New York courts are whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second are presented in the first."

When this test is applied to the present case and Cole, defendants' failure to meet any of these criteria is readily demonstrable.

A finding in the present case that the 1969 proxy statement was fraudulent and that the minority shareholders of BHM were injured as a result thereof, would not affect the finding by the trial court in Cole that the 1971 proxy statement was not fraudulent as to the minority shareholders of Schenley. The proposition is self-evident. If the pres-

ent action had proceeded to trial first and had resulted in judgment for plaintiffs on the 1969 merger, would defendants concede that that judgment was res judicata in Cole on the 1971 merger?

Similarly obvious is that evidence that the true value of Buckingham was concealed from the BHM minority shareholders in the 1969 proxy statement was not required to prove that the 1971 Schenley proxy statement was misleading. Indeed, as Judge Owen expressly found, it was not disputed in Cole that, by the time of the 1971 merger, the true value of Buckingham (the proceeds realized upon its sale by Schenley plus its cash which Schenley retained) was known to the Schenley stockholders, (A. 486-87). Thus, concealment of the value of Buckingham from the BHM minority 18 months earlier must be deemed irrelevant to any of the issues in the Cole litigation.

Finally, the essential facts and issues in the present case were not present in Cole. In Cole, as Judge Owen found, the essential issue was whether in 1971, in connection with the merger of Schenley into Glen Alden, the minority shareholders of Schenley were deceived by the concealment or misrepresentation of Schenley's surplus or excess cash position. However, the source of that cash, including the sale of Buckingham, was not in dispute and was fully revealed. Accordingly, the Cole plaintiffs

did not contend, and could not have contended, that the true value of Buckingham had been concealed from them in connection with the 1971 merger. However, in the present case, concealment of that very fact in the 1969 BHM proxy statement is the pivotal issue in plaintiffs' claim.

B. Collateral Estoppel

The federal rule governing the doctrine of collateral estoppel is set forth in United Shoe Machinery Corp. v. United States, 258 U.S. 451, 459 (1922):

> "... to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) if not, was some matter litigated in the former suit determinative of a matter in controversy in the second suit? To answer these questions, we must look to the pleadings making the issue, and examine the record to determine the questions essential to the decision of the former controversy." (emphasis supplied)

An issue which was not and could not have been involved or decided in the former suit cannot act as collateral estoppel in the latter. (Id. at p. 462).

Applying the Supreme Court's test to the present case, it is apparent that the question essential to the decision in Cole is not present in the instant case. As Judge Owen held, the question essential to determination

of Cole was whether the proxy statement issued in connection with the 1971 merger made adequate disclosure of Schenley's excess cash. (A. 486). Further, it is indisputable that the matter litigated in Cole was the adequacy of disclosure in the 1971 proxy statement. On the other hand, it is indisputable that the matter in controversy in the present suit is the 1969 proxy statement. It is illogical to argue that adjudication in Cole of the validity of the 1971 proxy statement is determinative of the validity of the 1969 proxy statement which is the subject matter of the present action.

It is necessary to again state that the critical fact issue in the present case, i.e., whether the 1969 proxy statement concealed the true value of Buckingham from BHM's minority, was not and could not have been raised in Cole since the 1971 proxy statement fully disclosed that value, a fact which the plaintiffs in Cole did not dispute. (A. 486-87).

It is true that the Cole plaintiffs alleged that through various means, including the deceptive 1969 proxy statement, Glen Alden depressed the market value of Schenley stock. But plaintiffs in Cole, who were Schenley stockholders, made no claim that, in connection with the 1971 merger, they were victims of this earlier deception

practiced on plaintiffs' class in the present case, who were BHM minority stockholders. Neither did the Cole plaintiffs claim that the alleged depressive effect of this earlier deception on the market price of Schenley stock still continued at the time of the 1971 merger. They could not have made such a charge in the light of their admission that, by the time of the 1971 merger, the essential fact concealed in the 1969 proxy statement, (the true value of Buckingham), was publicly known. (A. 486-87)

As might be expected, none of the authorities cited by defendants conflict with the law laid down by the Supreme Court in the United Shoe case. For example, in Ritchie v. Landau, 475 F.2d 151, 156 (2nd Cir. 1973), the court stated:

> "... the defense [of collateral estoppel] is available if the party against whom it is raised has had a full and fair opportunity to contest the issue in a prior case and the issue which was decided in the prior case is identical to the issue which is to be decided in the case in which the defense is raised." (emphasis added)

And, again, in Boothe v. Baker Industries, Inc., 262 F.Supp. 168, 174 (D. Del. 1966), the court found that both cases involved the validity of the same proxy statement and the fairness of the same merger.

Finally, defendants' argument that the doctrine of collateral estoppel bars plaintiffs' claim in the present case, because plaintiffs in Cole suffered a failure of proof on Count I of their complaint challenging the 1971 merger, is without merit since defendants here have failed to carry their burden of demonstrating that the issues determinative of the claim in the present case were present, were disputed, and were adjudicated in Cole.

C O N C L U S I O N

Throughout this litigation defendants have labored strenuously to deny plaintiffs an opportunity to place the very substantial merits of their claim before a trier of fact. They have created a cloud of confusion between the claim in the present case and the unrelated claim in Cole, so much so as to persuade the trial court to erroneously deny class action certification and, ultimately, to dismiss the case altogether. In short, defendants have successfully used the Federal Rules not to serve but to defeat the ends of justice. Such tactics are to be condemned. Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966). Plaintiffs respectfully urge this Court to:

(a) Reverse the judgment order entered January 24, 1977 dismissing the above entitled action;

(b) Reverse the trial court's orders of September 19, 1975 and January 14, 1977 denying plaintiffs' motions for class action certification; and

(c) Remand the case to the district court with directions to enter appropriate orders pursuant to Rule 23 determining that this case may be maintained as a class action on behalf of all minority shareholders of BHM Industries, Inc. at the time of the merger of said corporation into Schenley Industries, Inc.; and directing that the case proceed on the merits.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE AND ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER AND MILDRED STILLER, as joint tenants,

Plaintiffs,

-against-

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS and B. DENMARK,

Defendants.

- -X

71 Civ. 1028
(R.L.C.)

NOTICE OF CLASS ACTION

TO CERTAIN STOCKHOLDERS OF SCHENLEY INDUSTRIES, INC.

This notice is given to the holders as of February 24, 1971, of COMMON STOCK and $1.40 CUMULATIVE CONVERTIBLE PREFERRED STOCK of Schenley Industries, Inc. (hereinafter called "Schenley Common or Preferred shares"). Such persons collectively are herein called "the Class". The Class consists of the following separate classes:

Class I - All owners, except defendants, of Schenley Common or Preferred shares as of the close of business on February 24, 1971.

Class II - All owners of Schenley Common or Preferred shares as of the close of business on February 24, 1971 who as of the date of this notice were parties to the appraisal proceeding pending in the Court of Chancery of the State of Delaware, New Castle County, entitled "Consolidated Civil Action No. 3746, E. F. Gibbons, et al., Petitioners v. Schenley Industries, Inc., Respondent." Any person who, with the consent of Schenley, withdraws from those proceedings after the date of this notice shall be a member of Class I described above.

The above-entitled action seeks the recovery of money damages from one or more of the above-named defendants arising out of the merger of Schenley Industries, Inc. and Glen Alden Corporation which was announced on February 25, 1971 and effectuated on June 17, 1971. Briefly summarized, the consolidated amended complaint in this action alleges that in order to acquire the shares held by the class for an inadequate consideration, the Schenley proxy statement dated May 21, 1971 and defendants' course of conduct from 1968 through June 17, 1971 concealed the true financial condition of Schenley thereby, among other things, depressing the market in Schenley shares. In so doing, the defendants are alleged to have violated sections 10(b) and 14(a) of the Securities Exchange Act of 1934, and other applicable laws. The defendants deny any wrongdoing.

No court has yet passed upon the merits of plaintiffs' claims, except that in June 1971, motions to enjoin the Merger were denied by the Court in two of these actions (Voege and Zisook) and the Court of Chancery of the State of Delaware denied a similar motion in an action entitled David J. Greene & Co. v. Schenley.

The court has ruled that the action shall proceed, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as a class action and has ordered that this notice be given to members of the Class. This notice is not to be understood as an expression by this Court as to the merits of any of the claims or defenses asserted by any party to this action, the Court having made no determination with respect thereto.

You will be considered a member of the Class unless you request exclusion from the Class. Persons who do not request exclusion will be bound by any favorable or adverse judgments which may be rendered hereafter in this action. You need not do anything if you want to be included in the Class. If you desire to be excluded from the Class, you must send the enclosed postcard, or otherwise communicate in writing to the Clerk of the Court, United States District Court, Post Office Box 429, New York, New York, 10005, setting forth your name, present address and requesting exclusion. Your request for exclusion must be received on or before April 11, 1974.

If you do not request exclusion, you may, if you desire enter an appearance in the action through counsel of your own choosing. If you do not enter such an appearance, then your interests will be represented by plaintiffs' counsel.

Dated: February 28, 1974

Raymond F. Burghardt
Clerk, U.S. District Court
Southern District of New York

No. 77-7109

STATE OF ILLINOIS, COUNTY OF COOK. } ss. L. B Rashevs being first duly sworn, deposes and says that he served two copies of the

Reply Brief

in the above entitled cause, as per statute herein made and provided, on

Mr. Marc P. Cherno
Fried, Frank, Harris, Shriver & Jacobson
120 Broadway
New York, New York 10005

Mr. Carl Robert Aron
Rubin, Baum, Levin, Constant & Friedman
645 Fifth Avenue
New York, New York 10022

and also filed the required number of copies of the above with the

U. S. Court of Appeals, Second Circuit

this 20th day of May, A. D. 19 77

L. B Rashevs

Subscribed and sworn to before me this 20th

day of May, A. D. 19 77.

Rose Marie Kremske

Notary Public.

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